UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Paco Swain Realty, L.L.C.,	)	**Docket No. CWA-06-2012-2712**
	)	
Respondent	)	**Dated: July 23, 2014**

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I. Procedural Background

This proceeding was initiated by the Director of the Water Quality Protection Division, United States Environmental Protection Agency, Region 6 ("Complainant" or "EPA") filing a Complaint on May 15, 2012 under section 309(g) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1319(g). The Complaint alleges that on multiple dates from about June 2007 through September 2010, Respondent discharged, and/or agreed with other persons to discharge, dredged material and/or fill material from point sources into wetlands constituting waters of the United States, without a permit issued under Section 404 of the Act. The Complaint states that on August 20, 2008, the United States Army Corps of Engineers ("Corps") issued a written Cease and Desist Order instructing Respondent to stop unauthorized work at the subject property. The Complaint charges Respondent with violations of Section 301(a) of the CWA and proposes assessment of a civil penalty.

On March 1, 2013, Respondent filed an Answer to the Complaint, admitting it did not have a permit, asserting that it is without sufficient information to admit or deny the broad allegations in the Complaint which include regulatory definitions and conclusions of law, and asserting several affirmative defenses. Thereafter, each party filed a prehearing exchange. Complainant proposed in its Prehearing Exchange a penalty of $45,000 for the alleged violations.

On September 6, 2013, Complainant filed a Motion for Accelerated Decision as to both liability and penalty ("Motion" or "Mot."), with an attached Declaration of William Nethery ("Nethery Declaration" or "Nethery Decl.") and Declaration of Donna Mullins ("Mullins Declaration" or "Mullins Decl."). On September 25, 2013, Respondent submitted a Supplemental Prehearing Exchange, and the next day, submitted an Opposition to Motion for Accelerated Decision ("Opposition" or "Opp."), with an attached Declaration of Gordon L.

"Paco" Swain, Jr. ("Swain Declaration" or "Swain Decl.").

On February 11, 2014, Respondent was ordered to submit summaries of certain proposed witness' testimony and resumes for expert witnesses, but to date Respondent has not submitted the information.

II. Relevant Law under the Clean Water Act

In 1972 Congress substantially amended the Federal Water Pollution Control Act, now commonly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301 of the Act provides that, except as in compliance with a permit under Section 404 of the Act, and certain other permits, limitations and standards not applicable in this case, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311.

A "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12), (16). "The term 'pollutant' means dredged spoil, solid waste, . . . biological materials, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Courts have ruled that bulldozers, backhoes and other heavy mechanized earthmoving equipment constitute a "point source" as "rolling stock." *E.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)(bulldozer and backhoe are point sources); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd* 537 U.S. 99 (2002)(tractor pulling a deep ripper is a point source).

The term "navigable waters" is defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). Regulations codified pursuant to the Clean Water Act define "waters of the United States" as including:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . [or] wetlands, . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . .;

* * *

(5) Tributaries of waters identified in paragraphs (g)(1)- (4) of this section;

* * *

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1) - (q)(6) of this section.

* * * *

40 C.F.R. §§ 232.2; 33 C.F.R. § 328.3(a).[1]

In turn, the term "wetlands" is defined as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

40 C.F.R. §§ 232.2; 33 C.F.R. § 328.3(b).

The U.S. Supreme Court's seminal decision *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") established two tests to determine whether wetlands are "adjacent to" waters of the United States and thus subject to jurisdiction under the Clean Water Act. Justice Scalia expressed the four-justice plurality opinion that "'waters of the United States' include only relatively permanent, standing or flowing bodies of water" that are "connected to traditional interstate navigable waters" and that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 732, 742. Waters that are merely occasional, intermittent, transitory or ephemeral are non-jurisdictional, as are waters with only a physically remote hydrologic connection to traditional navigable waters, according to the plurality opinion. *Id.*

An alternative standard, the "significant nexus" standard, was articulated by Justice Kennedy in his concurring opinion as follows: "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. 759, 780 (Kennedy, J., concurring). According to Justice Kennedy, wetlands with merely "speculative or insubstantial" effects on water quality are non-jurisdictional. *Id.*

Several federal circuit courts, as well as the Environmental Appeals Board ("EAB") and the *Rapanos* Guidance issued jointly by the Corps and EPA, have concluded that either *Rapanos* standard may be used. *See, e.g., United States v. Donovan*, 661 F.3d 174, 176 (3rd Cir. 2011), *cert. denied,* 132 S. Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006), *cert. denied*, 552 U.S. 948 (2007); *Smith Farm Enterprises, LLC*, 15 E.A.D. __ , CWA Appeal No. 08-02, 2011 EPA App. Lexis 10 (EAB 2011) ("*Smith Farm*"); *Henry Stevenson and Parkwood Land Co*., 16 E.A.D. ___, CWA Appeal No. 13-01, 2013 EPA App. LEXIS 36 (EAB 2013) ("*Parkwood*"); "U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's

1 Both the U.S. Environmental Protection Agency and the U.S Army Corps of Engineers have authority to promulgate regulations under the Act. 33 U.S.C. §§ 1344(b), 1361(a).

Decisions in *Rapanos v. United States* & *Carabell v. United States,"* at 3 (Dec. 2, 2008) ("EPA/Corps Joint Guidance"). That conclusion has been based, in part, on two other opinions in the *Rapanos* decision. In his concurring opinion, Chief Justice Roberts cited *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) and essentially referred to the rule stated in *Marks v. United States*, 430 U.S. 188, 1933 (1977), that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (internal quotation marks and citation omitted). *Rapanos*, 547 U.S. at 758 (Roberts, J., concurring). Writing for the dissent, Justice Stevens concluded by saying "the United States may elect to prove jurisdiction under either test." *Rapanos*, 547 U.S. at 810, n.14 (Stevens, J., dissenting).

Section 404(a) of the Act authorizes the Secretary of the Army, through the Corps, "to issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. The regulations define "dredged material" as "material excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Fill material" is defined as "material placed in waters of the United States where the material has the effect of . .. [r]eplacing any portion of a water of the United States with dry land" and includes "rock, sand, soil, clay, ... construction debris, . . . overburden from . . . excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." *Id*.

"Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States," which includes "[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2. The term does not include --

> Activities that involve only the cutting or removing of vegetation above the ground (e.g. mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging or other similar activities that redeposit excavated soil material.

Id. "Discharge of fill material" includes "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, or other uses; [and] causeways or road fills . . . ." *Id.*

A discharge of dredged material into waters of the United States constitutes discharge of "dredged spoil" and thus a discharge of a pollutant under the Act. 33 U.S.C. § 1362(6). *United States v. Deaton*, 209 F.3d 331,335 (4th Cir. 2000), *cert. denied*, 541 U.S. 972 (2004). Courts have held that an unlawful "discharge of a pollutant" includes redeposit of trees and vegetation dredged or excavated from a wetland into the same wetland (*Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)), "sidecasting," that is, digging a ditch in a wetland and piling excavated dirt on either side of the ditch (*United States v. Deaton*, 209 F.3d at 333,

335-336), "deep ripping," in which soil is "wrenched up, moved around and redeposited somewhere else" (*Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002)), and lateral movement of dirt, sand, rock, brush and/or other earthen material within a wetland (*United States v. Fabian*, 522 F. Supp. 2d 1078, 1093 (N.D. Ind. 2007), *United States v. Mlaskoch*, Civ. No. 10-2669 (JRT/LIB), 2014 U.S. Dist. LEXIS 43314 (D. Minn. March 31, 2014)).

III. Standards for Accelerated Decision

The Clean Water Act provides that a civil penalty "shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and *opportunity* for a hearing on the record in accordance with section 554 of Title 5." 33 U.S.C. § 309(g)(2)(B)(emphasis added). In turn, 5 U.S.C. § 554(c) of the Administrative Procedure Act provides that the "agency shall give all interested parties opportunity for . . . hearing and decision on notice . . . ." The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"), provide that the "Presiding Officer shall hold a hearing *if* the proceeding presents genuine issues of material fact." 40 C.F.R. § 22.21(b) (emphasis added). A case may be resolved through accelerated decision without a hearing if the following standard is met:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact to be decided with respect to any essential element of the claim, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 4 (1986). The movant must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FRCP 56(c)(1). Under Rule 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. 73 Am Jur 2d Summary Judgment § 23 (2d ed.); *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Once the movant's burden is met, to defeat summary judgment, the nonmoving party must show that a material fact is genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." FRCP 56(c)(1). Non-moving parties cannot defeat a motion for summary judgment merely by making assertions in legal papers or "by making claims without adequate evidentiary support – even if those claims, if true, would result in the moving party's victory." *Seaman v. Pyramid Techs., Inc.*, Case No. SACV 10-00070 DOC (RNBx), 2011 U.S.Dist. LEXIS 130394 *5, *12 (C.D. Cal., Nov. 7, 2011); see, 73 *Am Jur* 2d Summary Judgment § 34 (defendant opposing summary judgment "must show, by affidavit or other proof, that [it] has a bona fide and substantial defense."). An issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to oppose summary judgment); *Ricker v. Zinser Corp.*, 506 F.Supp. 1, 2 (E.D. Tenn. 1978), *aff'd sub nom. Ricker v. Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980) (affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial). Rule 56 of the FRCP provides that "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." FRCP 56(e)(3).

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 255 (1986)("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). A factual dispute is material where it "might affect the outcome of the suit under the governing law" and is genuine "if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id*. at 255. In the present proceeding, the evidentiary burden is a preponderance of the evidence. 40 C.F.R. § 22.24(b). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-250; *Newell Recycling*, 8 E.A.D. at 624, 1999 EPA App. LEXIS 28, at *59 (countervailing evidence must be sufficiently probative to create a genuine issue of material fact). The inquiry on motion for summary judgment is whether the evidence "is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-252.

When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (*quoting BWX Techs. Inc.*, 9 E.A.D. 61, 78 (EAB 2000)). If the moving party does show an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve its defense. *Id.* However, where

both parties fail to address affirmative defenses on complainant's motion for accelerated decision, the motion may be granted if respondent failed to provide factual support for them. *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9243, 2007 EPA ALJ LEXIS 37, *73-80 (ALJ, December 27, 2007).

When conflicting inferences may be drawn from the evidence and a choice among them would amount to fact finding, summary judgment is inappropriate. *Rogers Corp*., 275 F.3d at 1105. Ultimately, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S at 249.

IV. Liability

A. Elements of Liability

The Complaint alleges that on multiple dates between June 2007 through September 2010, Respondent, without a permit from the Corps, caused the discharge of dredged and/or fill material from point sources, including equipment in, on and to five wetlands and two tributaries within the Property "which were adjacent to, hydrologically connected to, and/or had a significant nexus to a navigable-in-fact body of water named Beaver Branch West Colyell Creek." Complaint ¶ 3.

To meet its initial burden as to liability on a motion for accelerated decision, Complainant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law with respect to the following elements of liability for a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a): (1) Respondent is a "person," (2) who "discharged" a "pollutant," (3) from a "point source," (4) into "waters of the United States," (5) without a permit under Section 318, 402, or 404 of the Act.

B. Undisputed Facts

The following facts are admitted by Respondent:

1. Respondent Paco Swain Realty L.L.C. is a corporation that was incorporated under the laws of the State of Louisiana. Complaint and Answer ¶ 1. Gordon L. "Paco" Swain, Jr. is the principal of Paco Swain Realty L.L.C.. Swain Decl. ¶ 1.

2. Respondent owned a 202 acre parcel of real property known as Louisiana Purchase Equestrian Estates ("the Property"), in Livingston Parish, Louisiana. Complaint and Answer ¶ 2; Swain Decl. ¶¶ 1, 2.

3. Wetlands existed on the Property. Swain Decl. ¶ 2; Respondent's Prehearing Exchange ("R's PHE") Exhibit 1.

4. Respondent engaged in land clearing and contouring to develop the Property as a

residential subdivision. Swain Decl. ¶¶ 1, 3; Respondent's Supplemental Prehearing Exchange ("R's Suppl. PHE") at 1; Answer ¶ 12.

5. On August 20, 2008, the Corps notified Respondent of violations of Section 301(a) of the Act through a written Cease and Desist Order noting the Corps' observation on June 12, 2008 of "mechanized landclearing and redistribution of fill material and deposition of hauled fill relative to ditching and road construction" in a wetland on the Property, and instructing Respondent to cease unauthorized work on the Property. Complaint and Answer ¶ 12; C's PHE Exhibit 3.

6. Respondent did not have a permit under Section 404 of the Act. Complaint and Answer ¶ 9; Opp. at 1 and 3.

C. Discussion

The first element of liability, that Respondent is a "person" under the Act is established by Undisputed Fact 1, *supra*, and the statutory and regulatory definitions of "person" which includes corporations. 33 U.S.C. § 1362(5), 40 C.F.R. § 232.2. Section 404 of the Act authorizes the Secretary of the Army, through the Corps, to issue permits for discharges of dredged or fill material into navigable waters. Respondent admits that it did not have such a permit. Undisputed Fact 6, *supra*. Therefore, the fifth element of liability is established. The second, third and fourth elements are discussed below.

1. Waters of the United States

a. Arguments of the parties

Complainant identifies two categories of waters on Respondent's Property as jurisdictional "waters of the United States": (1) Beaver Branch West Colyell ("BBWC") Creek and (2) wetlands adjacent to BBWC Creek. Complainant states that it is not seeking accelerated decision with respect to wetlands that are not adjacent to BBWC Creek, as Respondent did not request and thus the Corps did not complete a Jurisdiction Determination or significant nexus determination on those wetlands. Mot. at 8.

Citing to the Nethery Declaration, Complainant asserts that BBWC Creek is a tributary of Colyell Bay. Mot. at 6-7. Complainant asserts that Colyell Bay is a traditionally navigable water ("TNW"), that is, waters of the United States defined as those which "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide." *Id.* at 6 (quoting 40 C.F.R. §§ 122.2, 232.2); Nethery Decl. ¶ 5. Tributaries of TNWs are included in the regulatory definition of "waters of the United States" and thus BBWC Creek is encompassed by that definition. *Id.* at 6-7 (citing 40 C.F.R. §§ 122.2, 232.2).

Citing to the Nethery Declaration and its Prehearing Exchange Exhibit 4, Complainant

states that BBWC Creek is a relatively permanent water ("RPW") that connects to Colyell Bay via West Colyell Creek, which is another RPW. Mot. at 7, 8 (citing Nethery Decl. ¶¶ 5, 6, 8). Complainant states further that wetlands impacted by Respondent's activities are adjacent to and have a continuous surface connection to BBWC Creek. *Id.* Thus, Complainant argues, the wetlands meet the more restrictive standard established by the plurality opinion in *Rapanos,* that "waters of the United States" includes "wetlands with a continuous surface connection to bodies that are 'waters of the United States in their own right,'" which includes "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" Mot. at 7 (quoting *Rapanos,* 547 U.S. 715, 742 (2006)). Consequently, Complainant asserts that the "significant nexus" test under Justice Kennedy's concurring opinion in *Rapanos* need not be considered. Mot. at 8.

In its Opposition, Respondent merely asserts that "there exist genuine and material issues for trial, particularly as regards the significance of any effect on Traditionally Navigable Waters by Respondent's work on the subject property." Opp. at 1. Respondent simply claims "the right to question the methodology of Complainant's analysis by traversal of the report, and to retain an appropriate expert to challenge the conclusions, including the measurability of the significance by volume on the TNW's characteristics." *Id*.

b. Discussion and Conclusion

The first step in determining whether to grant Complainant's Motion is to determine whether it has shown that there is no genuine dispute that BBWC Creek and wetlands adjacent thereto are "waters of the United States" based on the materials cited by Complainant.

Mr. Nethery is a Senior Botanist in the U.S. Army Corps of Engineers' Regulatory Branch, Surveillance and Enforcement Section, in the New Orleans District, who has been employed by the Corps since 2001. Nethery Decl. ¶¶ 1, 2; C's PHE Exhibit 13. As a Senior Botanist, he regularly conducts on-site inspections and determines whether wetlands and other waters on the property are waters of the United States. *Id.* He states in his Declaration that he conducted an on-site inspection of the Property on June 12, 2008, and made the following observations:

> 5. During my inspection, I observed water in BBWC Creek. Based on my knowledge and experience, I believe BBWC Creek is a relatively permanent water ("RPW"). BBWC flows into another RPW known as West Colyell Creek which flows into Colyell Bay, a traditionally navigable water. Under current Corps policy and regulations, BBWC Creek is considered a water of the United States.
>
> 6. During my inspection, I observed evidence of a surface water connection (drainage patterns and sediment deposition) between the wetlands in the southwestern portion of the subject property and the BBWC Creek whereby water from the wetlands was flowing into BBWC Creek. * * * *
>
> * * * *

> 8. During my inspection, I observed evidence of a surface water connection (drainage patterns and sediment deposition) between the wetlands in the northwestern portion of the subject property and the BBWC Creek whereby water from the wetlands was flowing into BBWC Creek.

Nethery Decl. ¶¶ 5, 6, 8. In his Declaration, dated September 5, 2013, Mr. Nethery states that his statements are based on his review of his notes, files maintained by the Corps and EPA, and his recollection of his inspections of the Property. Nethery Decl. ¶ 3. He also states that he consulted the "Louisiana Purchase Equestrian Estates Wetland Delineation Report" prepared for EPA in October 2010 by contractor SAIC ("SAIC Report"), which is included in Complainant's Prehearing Exchange as Exhibit 4. He states that the SAIC Report "somewhat underestimates the wetlands at the subject property" but that Figures 4 and 7 in that Report "are representative of the locations where I observed wetlands impacts." Nethery Decl. ¶ 9.

The SAIC Report is based on a field evaluation of the Property on September 23 and 24, 2010. C's PHE Exhibit 4 p. 3. The Report describes the Property as having a relatively flat topography with low lying areas along BBWC Creek in the southwest corner of the Property. *Id* p. 2. The Report states that BBWC Creek, "[t]he largest surface water feature" on the Property, enters the Property hear its northwest corner, flows south along the western boundary of the Property, exits and then reenters the Property, and then flows south along the southwest area of the Property. *Id.* The location of BBWC Creek as flowing into West Colyell Creek is shown on Figure 1 of the Report. C's PHE Exhibit 4 Figure 1.

The SAIC Report identifies as "Wetland #1" an "emergent/forested wetland located in a low-lying area in the southern portion" of the Property, with dominant vegetation in undisturbed portions of the wetland being hydrophytic. *Id.* p. 3 and Appendix B. The location of BBWC Creek on the Property and the location of Wetland # 1 as adjacent to BBWC Creek are marked on Figures 4 and 6 of the Report. C's PHE Exhibit 4 Figures 4, 6. All soils identified in the vicinity of Wetland # 1, except two sampling points recorded in the Report, were characterized as hydric. *Id.* p. 4 and Appendix B. The Report states that the hydrology of the site had been altered by the construction of drainage ditches directly through wetlands, but Wetland Determination Data forms in Appendix B of the Report indicate that wetland hydrology was observed nevertheless at several sampling points in Wetland # 1. *Id.* p. 5 and Appendix B.

The SAIC Report identifies as "Wetland # 4" an "emergent/forested wetland" located in what appears to be an old stream channel connecting a wetland in the northwest corner of the Property with another wetland on the Property immediately north of Thoroughbred Lane. C's PHE Exhibit 4 p. 4. The location of Wetland # 4 as adjacent to BBWC Creek are marked on Figures 4 and 6 of the Report. C's PHE Exhibit 4 Figures 4, 6. Wetland # 4 has wetland hydrology, soils characteristic of hydric soils and hydrophytic vegetation. C's PHE Exhibit 4 p. 4 and Appendix B.

The exhibits cited by Complainant show that BBWC Creek is a tributary of West Colyell Creek, that both are relatively permanent waters and tributaries of waters identified as traditionally navigable waters, and that as such they are "waters of the United States." Nethery

Decl. ¶ 5; C's PHE Exhibit 4 p. 2 and Figure 1. Mr. Nethery has significant expertise in making jurisdictional determinations under the CWA. C's PHE Exhibit 13. His observations stated in his Declaration provide evidence that at the time of his inspection in 2008, wetlands existed on the Property with continuous surface water connections to BBWC Creek. Nethery Decl. ¶¶ 6, 8. The information in the SAIC Report is consistent with his observations. C's PHE Exhibit 4 pp. 3-5 and Appendix B. Therefore, Complainant has shown that these wetlands are "adjacent to" waters of the United States within the meaning of applicable regulations and *Rapanos* and are therefore subject to jurisdiction under the Clean Water Act. *Rapanos*, 547 U.S. at 732, 742; 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a)

The next step is to determine whether Respondent has shown a genuine dispute as to whether the BBWC Creek and wetlands are "waters of the United States." Respondent's bald assertions that "there exist genuine and material issues for trial, particularly as regards the significance of any effect on Traditionally Navigable Waters by Respondent's work on the subject property" and that it has the right to question the methodology of Complainant's analysis" and "to retain an appropriate expert to challenge the conclusions" (Opp. at 1) neither "cit[e] to particular parts of materials in the record" nor show that the Nethery Declaration or SAIC Report fail to establish the absence of a genuine dispute. FRCP 56(c)(1). Respondent's intention to retain an expert witness to challenge Complainant's conclusions does not raise an issue of fact. *King v. National Industries, Inc.*, 512 F.2d at 33-34; *Ricker v. Zinser Corp.*, 506 F.Supp. at 2, *aff'd sub nom. Ricker v. Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980).

Although not cited to in its Opposition, Respondent included in its Prehearing Exchange a document entitled "Wetland Assessment for LA Purchase Equestrian Estates" prepared by Harris Environment Services, Inc., dated June 21, 2006 ("Harris Report"), described as a wetland assessment performed in June 2006 in accordance with the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual. R's PHE Exhibit 1. The Harris Report states that several holes were dug to determine characteristics of the soil, and describes two types of "predominant soils located on the Property" as poorly-drained slowly permeable soils. The Harris Report describes two types of vegetation predominant at the site, namely loblolly pine tree and Chinese Tallow Tree. The Harris Report then concludes that areas characterized as wetlands are defined in a site map and "had the three characteristics as stated in the *Wetlands Delineation Manual."* R's PHE Exhibit 1 p. 5. Attached to the Harris Report are photographs labeled as views of trail, pine trees, underbrush, ferns, and gravel road. Also included are photographs labeled as six holes: Holes No. 1 and 5 described as "Hydric Soils, Wetland Confirmed," Holes No. 3 and 4 described as light grayish color, non-hydric soil and non-wet, Hole No. 2 described as light grayish color and non-wet, and Hole No. 6 described as "Silty-Sandy Soil, Non-Wet." *Id.* pp. 6-12. Appendix A of the Harris Report, entitled "Wetland Delineation Drawing," appears to be a plat of the Property with individual lots marked, but no markings of wetlands are apparent on the plat. Appendix B of the Harris Report includes two pages. One is entitled "Soil Characteristic Map" which appears be a printout of a map of a large area of land with soil types delineated and with the "Project Location" marked with an arrow in the extreme lower left of the map. The other is a diagram of the Property with the roads and nine holes marked on it, and wetland areas are marked around Holes No. 1, 5, 7 and 8. The Harris Report states: "[t]he wetlands as determined in our site investigation appear to be 'isolated wetlands," as "[i]t appeared that many of the wetland areas on site do not drain to existing canal, and therefore do not drain into nearby lakes

or rivers, . . . [t]he western portion drains into a canal along the western portion of the Property and other areas eventually drains (sic) into LA Highway 447, [and] the nearest lake or river is approximately ten miles (Amite River)." R's PHE Exhibit 1 p. 5.

The Harris Report lacks specific information supporting its conclusions. It does not describe relevant water bodies on and near the Property (BBWC Creek and West Colyell Creek), and does not provide a basis for the delineations of wetlands on the diagram. The statement that "[i]t appeared that many of the wetlands on site do not drain into existing canal, and therefore do not drain into nearby lakes or rivers" and that "[t]he western portion drains into a canal" suggests that some wetlands on the Property do drain into a "canal" and therefore into navigable waters. R's PHE Exhibit 1 p. 5. The extreme scarcity of information and vagueness as to vegetation, soil and hydrology diminish the probative value of the delineation of wetlands and the conclusion that they appear to be isolated. Thus the Harris Report is not significantly probative. Viewing the evidence presented through the prism of the preponderance of evidence standard, and in light most favorable to Respondent, no reasonable fact finder could conclude that the wetlands on the Property are not waters of the United States.

It is concluded that Complainant has established that the BBWC Creek and wetlands adjacent thereto on the Property are "waters of the United States."

2. <u>Discharge of a Pollutant from a Point Source</u>

a. <u>Arguments of the parties</u>

The next step in determining whether to grant Complainant's Motion is to determine whether it has shown that there is no genuine dispute that Respondent discharged a pollutant from a point source.

Complainant asserts that Respondent used mechanized equipment to clear wetlands of vegetation, place fill materials in wetlands, and construct drainage ditches on the property, as evidenced by Exhibits 3, 4, 5 and 9 of Complainant's Prehearing Exchange, showing that road construction and mechanized land clearing occurred, and that heavy equipment tracks existed at the sites of the violations. Mot. at 4-5. Consequently, Complainant asserts, discharges were from a "point source."

In support of a finding of "discharge of a pollutant," Complainant asserts that Respondent filled wetlands and tributaries to construct roads and to prepare parcels of property for residential development, engaged in mechanized landclearing, and constructed drainage ditches to drain wetlands. Complainant points to photographs in Exhibits 3 through 5 of its Prehearing Exchange, showing road construction and other activities observed during site investigations. Complainant explains that road construction and filling activities involved the deposit of dirt, rock and gravel into jurisdictional wetlands and waters that replaced the wetland or creek with dry land. Complainant states that drainage ditch construction involved disturbing and redepositing soil and rock within jurisdictional wetlands and waters, and that mechanized land clearing caused the redeposit of dredged material. Mot. at 6. Complainant asserts that

"sidecasting of dredged material" is shown in its Prehearing Exchange Exhibit 4, photos 44 and 45, and that in 2009 and 2010, Respondent constructed additional drainage ditches impacting BBWC Creek, as evidenced by Complainant's Prehearing Exchange Exhibits 4 and 6. *Id*.

Respondent's Opposition does not address the issues of whether there was a "discharge of a pollutant" or whether any discharge occurred from a "point source." Respondent's prehearing exchange does not include any exhibits or proposed testimony to rebut Complainant's arguments on these issues.

b. Discussion and Conclusion

Exhibit 3 of Complainant's Prehearing Exchange is a notice of violation and Cease and Desist Order from the Corps to Respondent, dated August 20, 2008, referring to the Corps' observations on June 12, 2008 of "mechanized landclearing and redistribution of fill material and deposition of hauled fill relative to ditching and road construction" on the Property and that "a portion of the work . . . has been determined to be in a wetland, a water of the United States" under its regulatory authority, constituting a violation of Section 301 of the Act.

The SAIC Report, Exhibit 4 of Complainant's Prehearing Exchange, includes a description of drainage ditches excavated in wetlands, road construction, and land clearing and grubbing. C's PHE Exhibit 4 p. 5. It also describes drainage ditches and stream crossings constructed within BBWC Creek between 2009 and 2010. *Id.* p. 6. Figure 7 in Exhibit 4 is an aerial photograph from 2010 showing roads and ditches, mapped wetlands, and wetland impacts on the Property, all marked in various colors. Appendix A of Exhibit 4 includes aerial photographs from 1998, 2001, 2004, 2005, 2006, 2007 and 2009, the latter two of which show evidence of road construction and clearing of significant amounts of vegetation. Appendix C of Exhibit 4 includes photographs taken in Wetland # 1 of drainage channels and ditches (Photos 9, 10, 20), areas cleared of all vegetation (Photo 18), and areas cleared of all vegetation with surface water present (Photos 11, 12, 13, 14).

Appendix C Photos 44 and 45 are described as views of a ditch "at the south end of Quarter Horse Lane" but there is no indication by the description of the photos or the heading on the page of photos ("Miscellaneous") that this ditch is in a wetland, and only portions of the southern end of Quarter Horse Lane are outlined as wetland areas on Figure 7. Photos 47 and 50 are described as views of drainage ditches, and Photo 46 shows a culvert stream crossing, but it does not state the name of the stream, and the descriptions of the location of these photos, "just north of the location" where BBWC Creek reenters the Property and "north of Wetland 3," indicate that they are not located in wetlands.

Exhibit 5 is a series of photographs taken by Mr. Nethery at the Property. Photos 3 and 7 therein are described as "[e]mergent wetland vegetation in disturbed road shoulder" and Photos 1, 6 and 9 are described as "Wet Pine Flatwood" or "Wet Oak Flat" disturbed by road construction. Comparing the slide showing the locations where the photos were taken with Exhibit 4 Figure 7, it is noted that the locations where Photos 1 and 3 were taken correspond to areas of impacted wetlands marked on Exhibit 4 Figure 7.

Exhibit 6 is an email from Brian Tutterow of SAIC to Donna Mullins stating that "it appears there was some additional work down between 2009 and 2010 on the creek located to the west of the Estates" and "[b]ased on observations in the field at GPS 60 and 61 it looks like all those white lines crossing the creek from east to west are drainage cuts across the creek and into a north/south ditch." C's PHE Exhibit 6.

Exhibit 9 is a letter from Paco Swain dated September 9, 2008 stating *inter alia* that roads and utilities were constructed in 2008, that a potential wetland area may exist on the cul-de-sac of Thoroughbred Lane on the northwestern portion of the property," and that "extreme measures" were taken to stabilize the roadway shoulders and associated ditches.

In addition, statements in the Nethery Declaration support Complainant's Motion. Mr. Nethery noted in his Declaration that during his inspection of the Property on June 12, 2008, where he observed evidence of surface water connections between wetlands and BBWC Creek in the southwestern and northwestern portions of the Property, he "observed evidence of mechanized land clearing and the deposition of dredged and fill material into areas of these wetlands" and that based upon his "notes, files and recollection" he observed at least 3 discrete areas where fill was placed into such a wetland in the southwestern portion and at least 2 discrete areas where fill was placed into such a wetland in the northwestern portion. Nethery Decl. ¶¶ 4, 6, 8.

He noted further that he "observed several locations along [BBWC] Creek where drainage ditches were constructed to and into BBWC Creek, causing the deposition of dredged and fill material into the creek" and that based upon his "notes, files and recollection" he "observed at least 6 discrete areas of BBWC Creek where dredged and/or fill material was deposited into BBWC Creek" as a result of the construction of drainage ditches. Nethery Decl. ¶¶ 4, 7.

Documents and photographs submitted by Complainant establish that Respondent engaged in mechanized land clearing, ditching and channelization on the Property in jurisdictional wetland areas, and that these activities included the redeposit of dredged and fill material and the substantial disturbance of root systems of vegetation in those areas. C's PHE Exhibit 4 pp. 5-6, Figure 7, Appendix A, and Appendix C Photos 9-14, 18, 20; Nethery Decl. ¶¶ 4, 6, 8. Documents and photographs also establish that Respondent engaged in road construction which involved redeposit of dredged and fill material into jurisdictional wetland areas. C's PHE Exhibit 4 Figure 7 and Appendix A; C's PHE Exhibit 5 Photos 1 and 3; Nethery Decl. ¶ 4, 6, 8. Therefore, even viewing the facts and evidence in the light most favorable to Respondent and making all reasonable inferences in its favor, Complainant has shown evidence that Respondent discharged a pollutant into wetlands subject to federal jurisdiction, and Respondent has not shown that any of the facts material to this issue are disputed.

It is concluded that there is no genuine issue of material fact as to the elements of liability.

3. Respondent's Affirmative Defenses

The next question is whether there are any genuine issues of material fact as to Respondent's affirmative defenses. In its Answer to the Complaint, Respondent asserted the following six affirmative defenses:

> (1) the Complaint fails to state a claim upon which relief can be granted,
> (2) Respondent acted in good faith and with a reasonable belief that his actions were lawful,
> (3) laches,
> (4) any noncompliance was wholly or partially caused by the Federal and/or State government,
> (5) any noncompliance was wholly or partially attributable to causes beyond Respondent's reasonable control, and
> (6) Respondent exercised good faith efforts to comply with the applicable regulatory requirements. Answer at 5-6.

For the fourth and fifth defenses, the Answer states that any civil penalties should be reduced in proportion to the degree those other causes are responsible for the violations. Answer at 5.

In their filings on the pending Motion, neither party refers to the affirmative defenses. The Rules of Practice provide that "[R]espondent has the burdens of presentation and persuasion for any affirmative defenses" and require Respondent to include in its prehearing exchange a narrative summary of expected witness testimony and copies of documents and exhibits it intends to introduce into evidence at the hearing. 40 C.F.R. § §22.19(a)(2), 22.24(a). The Prehearing Order (at 2) issued April 19, 2013, reiterates these requirements and explicitly requires Respondent to include in its prehearing exchange, with respect to each affirmative defense, "a narrative statement explaining in detail the legal and/or factual bases for such affirmative defense, and a copy of any documentation in support." Prehearing Order at 3. Respondent has failed to do so. Respondent therefore has abandoned its affirmative defenses. *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1352 (Fed. Cir. 1999)("an affirmative defense must be raised in response to a summary judgment motion, or it is waived"). Complainant's failure to refer to the affirmative defenses in its Motion is not fatal to its request for accelerated decision. *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9243, 2007 EPA ALJ LEXIS 37, *76-77 (ALJ, December 27, 2007) (accelerated decision granted as to respondent's liability although government failed to show there is an absence of evidence to support affirmative defenses, where respondent failed to refer to them in response to the motion and failed to supply any supporting argument or evidence in its prehearing exchange).

Even if the defenses were not deemed abandoned, Respondent's affirmative defenses fail for other reasons. Respondent's first affirmative defense, that the Complaint fails to state a claim upon which relief can be granted, is rejected on the basis that Complainant's prima facie case has been found factually and legally sufficient as discussed above. Respondent's assertions in its second and sixth affirmative defenses that it acted in good faith with reasonable belief that its actions were lawful and that it made good faith efforts to comply are rejected because the CWA is a strict liability statute, so "a defendant's intention to comply or good faith attempt to do so does not excuse a violation." *Connecticut Fund for Environment, Inc. v. Upjohn Co.*, 660 F.

Supp. 1397, 1409 (D. Conn. 1987); *see also*, *Sultan Chemists, Inc*., 9 E.A.D. 323, 349 (EAB 2000). "Considerations such as a defendant's good faith efforts to comply are therefore only relevant in considering what penalty must be imposed after liability has been established…" *United States v. Sheyenne Tooling & Mfg. Co*., 952 F. Supp. 1414, 1419 (D.N.D. 1996); *Sultan Chemists, Inc.*, 9 E.A.D. at 349 (Respondent's "alleged good faith is relevant for purposes of penalty mitigation only").

Respondent's third affirmative defense, laches, also does not raise a genuine issue of material fact. "To invoke laches, a defendant must demonstrate delay in asserting a right or claim, that the delay was not excusable, and that the delay caused undue prejudice to the party against whom the claim was asserted." *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 451-452 (E.D. Ark. 1991), *citing AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir.), *cert. denied*, 481 U.S. 1041, 95 L. Ed. 2d 822, 107 S. Ct. 1983 (1986). Laches generally cannot be asserted against the government, particularly when acting in its sovereign capacity to protect public welfare. *See FRM Chemical Inc.,* 2010 EPA ALJ LEXIS 18, *21-27 (ALJ, Sept. 13, 2010); *United States v. Admin. Enters., Inc.,* 46 F.3d at 672-73 (7th Cir. 1995). Further, Respondent has not made any showing of delay, that any delay was not excusable, or that any delay resulted in prejudice.

Respondent's fourth affirmative defense is that any noncompliance was caused wholly or partly by the Federal and/or State government. Both the factual and legal basis for this assertion are unclear. There is one statement in the Swain Declaration that "the first time the Corps was on the property was June 12, 2008, and respondent was first notified with a Cease and Desist Order on August 20, 2008, by which time [Respondent's] work on the subdivision was substantially complete." Swain Decl. ¶ 5. Whatever legal ground Respondent may be attempting to argue here is not articulated with adequate clarity and the factual support does not satisfy Respondent's burden of proof for this defense.

Respondent's fifth affirmative defense -- that any noncompliance was caused partly or wholly by causes beyond Respondent's reasonable control -- fails on the basis that the CWA is a strict liability statute. The strict liability environmental statutes "are action forcing, and brook no excuse for failure to achieve the required result." *Green Thumb Nursery, Inc*., 6 E.A.D. 782, 796 (EAB 1997). "[U]nder federal law mandatory duties to achieve certain results may not be avoided by failure to retain control over the situation." *Id*. at 796 n.29. This purported defense does not create a genuine issue of material fact regarding liability.

4. <u>Conclusion as to Liability</u>

It is concluded that there are no genuine issues of material fact with respect to liability, and Complainant is entitled to judgment as a matter of law that Respondent is liable for discharge of a pollutant from a point source into waters of the United States without a permit, in violation of Section 301(a) of the Act. Thus, Complainant's Motion is granted with respect to Respondent's liability for the violations alleged in the Complaint.

V. Penalty

A. Legal Authorities

Section 309(g)(1)(A) of the CWA authorizes EPA, upon a finding that a person has violated Section 301 of the Act, to assess a civil administrative penalty. Section 309(g)(2) of the Act and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, set the maximum penalty level per violation for civil penalties. For violations occurring from March 15, 2004 to January 12, 2009, the maximum penalty allowed by statute is $11,000 per day per violation, up to a total of $157,500. For violations occurring after January 12, 2009, the statutory maximum penalty is $16,000 per day per violation, up to a maximum of $177,500. 40 C.F.R. §§ 19.2, 19.4.

Section 309(g)(3) of the Act specifies the following factors that must be taken into account in determining the amount of any penalty assessed:

> the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

The Rules of Practice require that the civil penalty be determined based on the evidence in the record and in accordance with any penalty criteria set forth in the applicable statute. The Rules also require that any civil penalty guidelines issued under the Act be considered in such determination. 40 C.F.R. § 22.27(b).

EPA has not developed any penalty policy or guidelines for cases litigated under the CWA. However, two general enforcement penalty policy documents have been accepted as appropriate guidance: EPA General Enforcement Policy # GM-21, Policy on Civil Penalties ("Policy on Civil Penalties"), and EPA General Enforcement Policy # GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties ("Penalty Framework"); both documents are dated February 16, 1984. These policies instruct that a preliminary deterrence figure should first be calculated based upon any economic benefit of the noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors. EPA has developed a "Clean Water Act Section 404 Settlement Penalty Policy" ("Settlement Penalty Policy" or "SPP"), dated December 21, 2001, which states that it "is not intended for use . . . in determining penalties at hearing or trial." SPP at 4. The EAB has opined that "[a]lthough settlement policies as a general rule should not be used outside the settlement context, . . . there is nothing to prevent [judges from] looking to relevant portions thereof when logic and common sense so indicate." *Britton Constr. Co.*, 8 E.A.D. 261, 287 n.16 (EAB 1999). Nevertheless, the Board has strongly cautioned that reliance on the Settlement Penalty Policy in the litigation context may detract from the requisite consideration of the statutorily mandated penalty factors and the Agency's general litigation penalty policies. *Parkwood*, 2013 EPA App. LEXIS 36, *46-47, *58-59, *68.

The Supreme Court has stated that "highly discretionary calculations that take into account multiple factors are necessary" to determine CWA penalties. *Tull v. United States*, 481, 427 (1987). In calculating civil penalties under CWA section 309(d), which identifies penalty calculation factors similar to those for administrative penalties listed in section 309(g), Federal courts have generally used either a "bottom up" or "top down" method. The "bottom up" method starts with the economic benefit on noncompliance and then adjusts upwards based on the other statutory factors, whereas the "top down" approach starts with the statutory maximum and subtracts for any mitigating statutory factors.

"Generally there is great reluctance to impose civil sanctions without providing the violator an opportunity for an oral evidentiary hearing." *Swing-a-Way Manufacturing Co*., EPA Docket No. EPCRA-VII-91-T-650 E, 1993 EPA ALJ LEXIS 360, *2 (ALJ, March 12, 1993). Where facts as to a statutory penalty assessment factor are genuinely disputed, summary judgment as to the penalty is inappropriate. *Friends of Bull Lake , Inc. v. Beasley*, No. CV 02-72-M-DWM, 2003 U.S. Dist. LEXIS 25218 (D. Mont., Sept. 22, 2003)(determination of the level of culpability is material to the outcome of assessment of civil penalties; where facts as to the violator's level of culpability were in dispute, motion for summary judgment as to a penalty under the CWA was denied).

However, where EPA has come forward with evidence showing that the proposed penalty is appropriate, and the respondent does not raise any genuine issue of fact material to the penalty assessment, accelerated decision may be granted in favor of complainant as to the penalty. *Green Thumb Nursery*, 6 E.A.D. 782, 792-94 (EAB 1997). The EAB has upheld accelerated decision with respect to the penalty where EPA had presented evidence in support of its proposed penalty and calculated it in accordance with an applicable penalty policy and the respondent's penalty arguments failed to raise a genuine issue of material fact. *Woodcrest Manuf'g Inc.,* 7 E.A.D. 757, 775, 1998 EPA App. LEXIS 63 (EAB 1998); *Newell Recycling Co., Inc.*, 8 E.AD. 598, 625-642, 1999 EPA App. LEXIS 28 * 60-61, *aff'd sub nom. Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 201-211 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001)(no genuine issues of material fact were raised by speculation that sampling and analysis may have produced an erroneous result, by insufficiently supported claims of estoppel, undue delay and selective enforcement, or by assertions that lack of harm to the environment and cost of remediation were not considered.).

B. Complainant's Penalty Calculation

Complainant's penalty calculation is summarized on a penalty calculation worksheet prepared by Ms. Donna Mullins, who calculated the proposed penalty. C's PHE Exhibit. 8. Ms. Mullins, an experienced member of EPA's Wetland Enforcement Team explains her calculation in her Declaration. Mullins Decl. ¶¶ 1-3, 8. She states that she calculated the proposed penalty based on the statutory penalty factors in CWA section 309(g), and "considered" EPA's Settlement Penalty Policy. *Id*. ¶ 8.

She states that she considered the circumstances of the violation, referencing the

inspection, Cease and Desist Order and SAIC Report, and considered the seriousness of the violations and actual or potential harm resulting from the violations, and determined that the violations "involve a medium degree of compliance significance." Mullins Decl. ¶¶ 10, 11. Therefore, under the Settlement Penalty Policy she assigned a mid-level multiplier of $1,500. Mullins Decl. ¶ 11. The Settlement Penalty Policy states that this multiplier value is appropriate "for violations with moderate overall environmental and compliance significance." SPP at 10.

Ms. Mullins assigned a low value of 2 (of a maximum of 20) to each of several factors comprising "environmental significance" (the "A factors" in the Settlement Penalty Policy equation), including extent (acreage size) and severity of impact to the aquatic environment, uniqueness/sensitivity of the affected wetland resources, and secondary or off-site impacts -- in this case, downstream sedimentation. Mullins Decl. ¶ 12. She assigned a value of 5 (of a maximum of 20) for the duration of the violation "because Respondent discharged on multiple days, and Respondent has allowed the fill to remain in place and continues to utilize the ditches to drain wetland on the subject property." *Id*.

With respect to "compliance significance" (the "B factors" in the Settlement Penalty Policy formula), Ms. Mullins assigned a value of 5 out of 20 for Respondent's degree of culpability. *Id*. ¶ 14. This culpability value was based on factors such as Respondent's high degree of control over the residential development activities, Respondent's knowledge of the environmental consequences – Respondent's sole purpose of constructing multiple ditches was to drain the wetlands, and Respondent's motivation was to destroy these wetlands in order to maximize the residential value of the property. *Id*. Ms. Mullins notes that this culpability factor could actually be raised, because it does not currently account for factual observations that Respondent engaged in additional work after receiving a Cease and Desist Order from the Corps, "demonstrate[ing] that Respondent had actual knowledge of the need for a permit prior to performing this latter work." *Id*. ¶ 15. In terms of compliance history, Ms. Mullins assigned a value of 2 out of 20, based on Respondent's failure to comply with Cease and Desist Orders at two other similar sites. *Id*. ¶ 16. Regarding "need for deterrence," Complainant assigned the moderate value of 10 out of 20, on the basis that Respondent's violation of Cease and Desist Orders at a similar site (Megan's Way) in the parallel case, Docket No. CWA-06-2012-2710, "indicates a proclivity to ignore regulatory structures and, when considered alongside Respondent's multiple violations at similar properties, Respondent is likely to repeat the violations." *Id.* ¶ 17.

In terms of any additional gravity adjustment factors, Ms. Mullins states that no adjustment was made for "other factors as justice may require," and that Respondent has not provided any evidence to substantiate an assertion of inability to pay, so she made no penalty adjustment related to this factor. *Id*. ¶ 18. *Id*. ¶ 19. The penalty calculation does not include an economic benefit factor, as Complainant does not allege that Respondent gained a significant economic benefit from the noncompliance. C's PHE at 8.

Ms. Mullins arrived at the proposed penalty of $45,000, applying the Settlement Penalty Policy, by multiplying the 30 cumulative points obtained for the A and B factors by the mid-level multiplier figure of $1,500. Mullins Decl. ¶ 20.

Looking to the maximum penalty provisions under the CWA, Complainant asserts that site inspections revealed ten discrete impacts and eleven ditches impacting a water of the United States, and that construction activities with heavy equipment occurred in jurisdictional wetlands and other waters of the United States. *Id*., citing C's PHE Exhibits 4, 5, 6. Pointing to the opinion in *Borden Ranch P'ship v. United States Army Corps of Eng'rs*, 261 F.3d 810, 817-18, that "each pass" of the heavy equipment is a separate violation, Complainant asserts that there is ample evidence in this case to infer that a sufficient number of separate violations occurred to support the proposed penalty. *Id*.

C. Respondent's Arguments

Respondent attacks several aspects of Complainant's penalty calculation. First, Respondent asserts that, in the preliminary gravity calculation, Complainant's mid-level "multiplier" of $1,500, representing a medium degree of environmental and compliance significance, should be reduced to a low level of $500. Opp. at 2. Respondent argues that "no substantial environmental harm was done" and denies that Complainant can prove adverse impact to 2,730 linear feet of waters. *Id*. Further, Respondent contends that the amount of wetland area is proportionately "minimal" relative to the total size of the subject property. *Id*.

Next, Respondent asserts that the deterrence factor should be completely eliminated from the penalty calculation. *Id*. Respondent emphasizes "there is absolutely no likelihood that Respondent would ever repeat the mistakes made in this or the other cases" and "no penalty could possibly provide a higher disincentive than the tremendous burden" that Mr. Swain and his family have endured financially, physically emotionally and professionally as a result of Complainant's actions in the Megan's Way matter." *Id*. (emphasis in original).

In his Declaration, Mr. Swain explains that EPA shut down work on Respondent's Megan's Way subdivision, resulting in the bank suing Respondent on the mortgage, seizing the property, being awarded a judgment against Respondent of over $1.8 million, confiscating a Certificate of Deposit and availing itself of Respondent's collateral. Swain Decl. ¶ 6. He explains that he attempted to sell the property but the bank is not cooperating. *Id*. Mr. Swain asserts that these events and the Cease and Desist Orders caused him "incredible financial hardship," that all income and debts of Respondent flow through to Mr. Swain and his wife, and that Respondent is not able to pay a penalty, as evidenced by financial documents he has submitted. Swain Decl. ¶ 7. Respondent raised the argument that it was unable to pay the penalty in its original Prehearing Exchange, filed July 29, 2013 (R's PHE at 3), and subsequently, after the Motion was filed, provided Mr. Swain's federal individual income tax returns for 2005 through 2012 in its Supplemental Prehearing Exchange, dated September 25, 2013. R's Suppl. PHE Ex. 3. According to Respondent, "[t]hese records show the income of the Swains plummeting from over a quarter million dollars to a Negative $194,000 annually" with no positive income over the past four years, and no turnaround is expected anytime soon. Opp. at 2. The "Personal Financial Statement" of Gordon L. "Paco" Swain, Jr. shows a negative net worth. Opp. Attachment B.

D. Discussion and Conclusion as to Penalty

The first question in determining whether to grant a motion for accelerated decision on the penalty is whether Complainant has shown that a material fact as to the penalty cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FRCP 56(c)(1).

Complainant's explanation of its penalty calculation is relatively brief in describing the underlying factual basis to support the various numerical values assigned in the calculation. Moreover, the calculation is based on the formulas set out in the Settlement Penalty Policy, the approach criticized by the EAB in *Parkwood* for its neglect of the statutory penalty criteria and the Agency's general litigation penalty policies. 2013 EPA App. LEXIS 36, *46-47, *58-59, *68. The Motion, Mullins Declaration and other documentation cited by Complainant do not clearly establish that there is no fact material to the calculation of the penalty that can be genuinely disputed.

Furthermore, even if Complainant met its initial burden, Respondent has raised a genuine issue of material fact with respect to inability to pay the penalty.

The EAB has stated that because it may be difficult for EPA to obtain much information about a respondent's ability to pay at the time the complaint is filed, "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury, Ltd*., 5 E.A.D. 529, 541 (EAB 1994). The Rules of Practice at 40 C.F.R. § 22.19 require a respondent to present in its prehearing exchange any arguments and evidentiary exhibits relevant to penalty assessment, including inability to pay.

In the instant case, although filed after the pending Motion, Mr. Swain provided copies of his individual federal income tax forms for seven years from 2005 to 2012, each with attached Schedule C forms indicating substantial net losses of Respondent for the years 2007 through 2012, and indicating a substantial negative individual income for Mr. Swain and his wife for the years 2009 to 2012. R's Suppl. PHE Ex. 3. The personal financial statement submitted by Mr. Swain shows a negative net worth. Opp. Attachment B. Mr. Swain in his Declaration has described severe financial strains resulting from legal actions taken against it by both EPA and the bank holding a mortgage on the Megan's Way property. Swain Decl. ¶¶ 6, 7. Viewing the facts in the light most favorable to Respondent and drawing justifiable inferences in its favor, Respondent has shown that a genuine issue of material fact exists with respect to Respondent's ability to pay the proposed penalty. It is not necessary to address any other factors or issues as to the penalty assessment in this Order. Accordingly, Complainant's Motion for Accelerated Decision as to the penalty must be denied.

ORDER

1. Complainant's Motion for Accelerated Decision is **GRANTED** with respect to Respondent's liability for the violations alleged in the Complaint.

2. Complainant's Motion for Accelerated Decision is **DENIED** with respect to the penalty.

3. Issues remain controverted as to the appropriate penalty to assess for the violations found herein. Unless the parties achieve a settlement and file a Consent Agreement and Final Order resolving this matter beforehand, a hearing on the controverted issues in this matter will be scheduled.

4. The parties shall continue in good faith to settle this matter. Complainant shall file a Status Report as to the status of any settlement efforts on or before **August 29, 2014**.

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M. Lisa Buschmann
Administrative Law Judge